

Before
UTTARAKHAND ELECTRICITY REGULATORY COMMISSION
Petition No. 08 of 2015

In the matter of:

Petition filed for adjudication and appropriate direction under Section 86 (1) (f), 94(2) of the Electricity Act, 2003 read with Regulation 20 & 21 of the UERC (Conduct of Business) Regulations, 2014 for adjudication of disputes with licensees and issuance of necessary directions to them.

And

In the matter of:

M/s Swasti Power Limited ...Petitioner
111, Road No. 72, Jubilee Hills, Hyderabad

&

In the matter of:

Uttarakhand Power Corporation Limited (UPCL) ... Respondent 1
Power Transmission Corporation of Uttarakhand Limited (PTCUL) ...Respondent 2

CORAM

Shri Subhash Kumar	Chairman
Shri C.S. Sharma	Member
Shri K.P. Singh	Member

Date of Order: October 21, 2015

This Order relates to the Petition filed by M/s Swasti Power Limited. (hereinafter referred to as "the Petitioner" or "the Generator" or "the Developer") for adjudication of the disputes between M/s Swasti Power Ltd. and Uttarakhand Power Corporation Ltd. arising out of the Power Purchase Agreement dated 03.07.2009, recovery of loss of generation on account of frequent outages & inadequate transmission line capacity for evacuation of power from the project and adjudication of the disputes between the Petitioner and the Respondents (UPCL & PTCUL), to complete the commissioning of 220/33 kV Ghansali S/s and to provide connectivity in accordance with the outcome of the meeting dated 26.12.2006 of GoU and subsequent MoU signed with PTCUL/UPCL by the Petitioner on 12.07.2007.

1. Background

The Petitioner is a company incorporated under the provisions of the Companies Act, 1956 and is engaged in the business of generation & sale of Electricity. The Petitioner has implemented, established and commissioned the Bhilangana Hydro Power Project (BHPP) (3x7.5 MW) in River Bhilangana in District Tehri of the State of Uttarakhand.

2. Facts of the Case

- (1) The Petitioner had entered into an implementation agreement dated 16.10.2003 for development and implementation of the project and subsequent to this a Power Wheeling Agreement was executed by the Petitioner on 30.09.2005 with Respondent No. 2, i.e. PTCUL for evacuation of power from the project through a dedicated 220 kV transmission line emanating from the Project to the interconnecting 220 kV substation, Chamba.
- (2) PTUCL vide its letter dated 07.04.2006 & 29.06.2006 informed the Petitioner that the evacuation of power generated from the project was to be arranged by PTCUL initially through 33 kV lines to existing 33/11 kV Ghansali S/s by March 2007.
- (3) To expedite the works related to evacuation of power from the project and to ensure the evacuation of power as per IA dated 16.10.2003, a meeting was convened by Additional Secretary (Energy), GoU on 26.12.2006 with Respondents (UPCL & PTCUL), wherein the following was agreed upon:

“ ...

फिलहाल PTCUL घन्साली से चम्बा की 220 के0वी0 लाईन, विशेषकर घन्साली-रजाखेत भाग का निर्माण करेंगे जबकि भिलंगना परियोजना के स्विचयार्ड से घन्साली तक 33 के0वी0 लाईन का निर्माण विकासकर्ता द्वारा किया जायेगा। इस व्यवस्था के अन्तर्गत रजा खेत से आगे चम्बा तक वर्तमान 33 के0वी0 लाईन से ही काम चलाया जायेगा क्योंकि घन्साली से रजा खेत भाग में बनायी जाने वाली 220 के0वी0 लाईन को फिलहाल 33 के0वी0 में ही ऊर्जीकृत किये जाने का प्रस्ताव किया जाता है। यद्यपि डीपीआर में तथा PTCUL के साथ किये गये व्हीलिंग अनुबंध में विकासकर्ता द्वारा चम्बा तक 220 के0वी0 लाईन का निर्माण किया जाना था परन्तु इस मध्य एडीबी वित्त पोषित परियोजना के दृष्टिगत उक्त संशोधन की आवश्यकता बतायी गयी। इस परिपेक्ष्य में PTCUL एवं निजी विकासकर्ता के मध्य हुए वर्तमान व्हीलिंग अनुबंध में यथा आवश्यक संशोधन के संबंध में निदेशक मण्डल के अनुमोदन से विचार किया जा सकता है। साथ ही 33 के0वी0 घन्साली उप केन्द्र में विद्युत की निकासी के उद्देश्य से किये जाने वाली संबंधित कार्यों के

संबंध में निजी विकासकर्ता, UPCL एवं PTCUL के मध्य आपसी समन्वय से यथा संबंधित कार्य किये जायेंगे तथा निजी विकासकर्ता द्वारा इस संबंध में UPCL से यथा आवश्यक अनुमति प्राप्त की जायेगी। उपकेन्द्रों में किये जाने वाले संबंधित कार्यों की लागत विकासकर्ता द्वारा वहन की जायेगी। पिटकुल के प्रबन्ध निदेशक द्वारा घन्साली से रजाखेत भाग में प्रस्तावित 220 के0वी0 लाईन का निर्माण 01 जनवरी, 2007 से सात माह में पूर्ण किये जाने की समय सारिणी इंगित की गयी।” [Emphasis added]

- (4) Highlighting the limitation of 33 kV line from Ghansali with regard to handling the generated capacity of 25 MW during peak season, the Petitioner emphasized the need of 220 kV S/s Ghansali and signed a Memorandum of Understanding (MoU) dated 12.06.2007 with PTCUL wherein it was agreed that PTCUL would arrange to evacuate power from the inter-connection point, i.e. Proposed 220/33 KV sub-station at Ghansali.

PTCUL, as a stop gap arrangement, also agreed to evacuate the power of BHPP through 220 kV Ghansali Rajakhet-Chamba line by charging it on 33 kV and through the existing 33 kV substation at Ghansali and the existing distribution system at Ghansali.

PTCUL also informed that the power would be evacuated as per interim arrangement pending construction of 220 kV substation at Ghansali on existing system of UPCL through their 33 kV network upto Chamba-Tapovan, Jakholi and Jakhanidhar till 30.04.2008 and beyond that date and upto 15.05.2008 PTCUL would allow connectivity to 220 kV Ghansali-Chamba line at Rajakhet to existing 33 kV Rajakhet-Jakhanidhar-Chamba line, so that additional power can be evacuated on 33 kV as an interim arrangement till commissioning of 220/33 kV substation Ghansali.

- (5) Re-iterating the limitations of the interim arrangements for evacuation of 25 MW generation from the BHPP due to limited load demand at Chamba, the Petitioner requested PTCUL for taking necessary action on this account for the changes required in the system and also requested for indicating a date for signing Transmission Service Agreement (TSA).
- (6) PTCUL vide its letter dated 27.01.2009 informed the Petitioner that in order to seek Long Term Open Access, it had to seek permission from UPCL to use their network as desired by GoU, MoM dated 26.12.2006 and also have a PPA with UPCL.

- (7) With regard to the use of UPCL's network, as desired by PTCUL, the Petitioner approached UPCL vide letter dated 18.02.2009 for seeking permission in line with MoM dated 26.12.2006.
- (8) Subsequently, the Petitioner signed a PPA on 03.07.2009 with UPCL for sale of entire energy generated by the project and consequently connectivity to the grid system was provided at 33 kV bus bar of 33/11 kV S/s of UPCL at Ghansali on 17.07.2009.
- (9) The Petitioner submitted that apart from the above said delay, the power lines were grossly inadequate for evacuating the available power generation which resulted in substantial loss of generation during the monsoon months and it was only on 02.10.2009, when the 220 kV line from Ghansali to Chamba was charged at 33 kV and made available to the Petitioner. The Petitioner has further submitted that till the date of filing of the Petition, it has experienced huge financial losses on account of loss of generation due to insufficient power evacuation system. The Petitioner has submitted that the UPCL & PTCUL jointly failed to provide connectivity to the Project.
- (10) For resolving the problems of power evacuation of SHPs in the State of Uttarakhand, the Commission convened a meeting on 23.06.2010 & 05.08.2010 with Respondent No. 1, 2 and SHP developers in which the Commission directed Respondent No. 2 to submit work plan alongwith the schedule of activities, in the form of Pert Chart, for completion of 220 kV Ghansali S/s and Bay at Chamba S/s by 20.08.2010.
- (11) In the wake of the decision dated 11.01.2011 issued by Hon'ble APTEL, UPCL vide its letter dated 21.03.2011 informed the Petitioner that if it wishes to continue to sell power to UPCL, then it shall have to enter into a long term agreement with UPCL as per UERC(Tariff and Other Terms of Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Co-generating Stations)Regulations, 2010 (RE Regulations 2010) UPCL also informed the Petitioner that the power evacuation was being done temporarily at 33 kV Voltage through 220 kV Ghansali Chamba line. However, a new temporary power evacuation arrangements to 33 kV line would be done by

constructing 19.725 Km. 33 kV double circuit line at an estimated cost of 4.73 Cr. and in case the Generator opted to take power outside the State than cost of construction this line from 33 kV S/s Ghansali to Pipaldali junction would be borne by M/s Swasti as per the Commission's Order dated 16.09.2010. In case the Petitioner did not enter into long term Power Purchase Agreement with UPCL as per RE Regulation, 2010 then energy bills of the Petitioner would be paid at old tariff as given in RE Regulations, 2008 from July 2010 onwards or at the rate decided by the Commission for short term power purchase.

In response, the Petitioner vide its letter dated 23.03.2011 agreed to execute long term PPA with UPCL for sale of power from their Project and submitted an undertaking vide letter dated 11.04.2011 for re-imbursement of the costs to be incurred by UPCL for strengthening of transmission line from Ghansali substation to Pipaldali junction in case the Petitioner opted to sell its power outside the State.

Thereafter, Respondent No. 1 sent a notice dated 25.04.2011 to the Petitioner and intimated that the arrangement of power evacuation of the generation through 220kV Ghansali-Chamba line would be withdrawn from 15.05.2011 as the 220 kV line was to be charged at 220 kV Voltage level.

- (12) The Petitioner vide letter dated 30.04.2011 informed UPCL that they had already agreed to supply power to it on long term basis and had executed an agreement with UPCL for supply of power. The Petitioner further submitted that after agreeing to sale of power to UPCL on long term basis the existing PPA with UPCL would become the Long Term PPA.

The Petitioner also submitted that it had given an undertaking to reimburse the cost of lines (in case the power is taken out of the state) and Respondent No. 1 would be responsible for any power loss due to withdrawal of power evacuation system from the Project.

- (13) The Petitioner had submitted that without any intimation or reply to its letter dated 30.04.2011, Respondents 1 & 2 disconnected the Project on 03.11.2011 from the 220 kV line charged at 33 kV, which was agreed as an interim

arrangement by all the Parties for power evacuation from the Project till the completion of 33/220 kV S/s, Ghansali. Thereafter, the Project was put on grossly inadequate 33 kV power evacuation system due to which the Petitioner had to incur a lot of financial loss due to loss of generation.

- (14) The Petitioner vide letter dated 27.01.2012 brought to the notice of the Commission and Respondent No. 1 with regard to the various difficulties being faced by the Petitioner for evacuating the power and also submitted the details of various financial and energy losses suffered by it on account of frequent trippings and breakdown in the power evacuation system of Respondent No. 1. Further, the Petitioner also requested the Commission to direct Respondent No. 2 for taking immediate necessary action for completing the 220/33 kV S/s at Ghansali in order to avoid generation loss incurred by the Petitioner.
- (15) The Petitioner vide its several letters from 27.01.2012 to 18.06.2012 conveyed the details of various power trippings/interruptions /breakdowns details responsible for the loss of generation to Respondent No. 1 and at the same time vide its letter dated 16.03.2012 requested PTCUL to expedite the construction of the 220/33 kV substation at Ghansali.
- (16) The Petitioner vide its letter dated 05.11.2012 informed Respondent No. 1 that the power evacuation constraints have resulted in serious financial difficulties to it.
- (17) The Petitioner vide its letter dated 19.04.2013 informed Respondent No. 2 regarding the generation loss to the tune of 21 MU during 2012-2013 and informed that it had faced a huge financial loss of Rs. 7 Crore on account of the same. Further, Petitioner requested Respondent No. 2 to expedite the construction of long delayed 220/33 kV new Ghansali S/s.
- (18) The Petitioner vide its letter dated 05.09.2013 informed Respondent No. 1 regarding Rs. 1.94 Crore, Rs. 1.17 Crore & Rs. 6.76 Crore loss of generation faced by it on account of frequent power tripping/breakdowns and insufficient power evacuation system in the year 2010-11, 2011-12 & 2012-13 respectively.

(19) The Petitioner vide its letter dated 21.08.2014 again highlighted the matter of power interruptions/breakdowns resulting in huge financial loss to it and submitted the details of total loss of energy on account of deficiencies of Respondent No. 1 from the date it was ready to generate power till June 2014. The Petitioner also submitted that it had incurred huge financial losses to the tune of Rs. 1776.58 Lac on account of loss of 59.15 MU of generation.

(20) The relief sought by the Petitioner in its Petition are reproduced below:

“

- a. *direct the Respondents No. 1 & 2 to pay to the Petitioner an amount of Rs. 1,776.58 lakhs being the value of evacuation losses / generation that was bottled up / financial losses suffered by the Petitioner on account of delay in providing connectivity to the Project, unilaterally changing the evacuation system and on account of the trippings/breakdown of the unreliable inadequate transmission system provided by the Respondents.*
- b. *Direct the Respondents No. 1 & 2 to pay past, pendnelite and future interest @18% p.a. on prayer (a) above calculated from the date of filing of the instant Claim upto the date of actual payment.*
- c. *Direct the Respondent No. 2 to immediately construct 220/33KV Ghansali substation and associated facilities for proper evacuation of power from the Project.*

...”

(21) The Commission heard the matter for admissibility and issued an Order dated 07.04.2015 admitting the Petition directing the Respondents namely PTCUL and UPCL to submit their comments, if any latest by 09.03.2015.

3. Submissions of Respondents

(1) In compliance to the Commission's direction, Respondent No. 2, i.e. PTCUL submitted that there was no dispute between the Petitioner and PTCUL that required adjudication and the Petitioner had as per his own free will, not relying on any previous negotiation and documents executed between them, entered into a PPA with UPCL and chose to supply power to UPCL at 33 kV Substation of UPCL at Ghansali.

(2) PTCUL also submitted that after coming into force of UERC (Intra-State Open Access) Regulation, 2010 the MoU signed between the parties had become infructuous and as per Regulation 5-Chapter 2 of the Regulation dealing with Connectivity, the SHP with capacity of 10 MW and above, was required to

apply to PTCUL for connectivity at 132 kV and above and the Petitioner had never intimated PTCUL about its intention of applying for connectivity or never applied for connectivity to the PTCUL's Grid in line with the aforesaid Regulations. PTCUL further submitted that the Petitioner was required to apply for connectivity to the PTCUL's Network which was not done till date and the Petitioner had also not sought any change in PPA with UPCL regarding the point of evacuation of power from the generating station.

- (3) With regard to the contention of the Petitioner claiming right to connection at two different points in network of two different licensees, PTCUL submitted that the same was baseless, impermissible and against the provision of law.
- (4) PTCUL also submitted that the Petitioner had not disclosed under what provisions of the Electricity Act or the Power Wheeling Agreement it could claim compensation from the respondent or could seek such directions as was sought by the Petitioner in the instant Petition.
- (5) PTCUL submitted that it is apparent from the facts of the case that Petitioner did not comply with the various terms and conditions of PWA, even otherwise the PPA and the PWA could not exist together in the existing form and above all from the documents available on record.
- (6) PTCUL submitted that the Article 12.1 of the Power Wheeling Agreement necessarily mentioned about referring any dispute, first to conciliation, this is without prejudice and without admitting that there is any dispute, or there can be any such dispute at present.
- (7) PTCUL submitted that the Petitioner has not availed Open Access on the PTCUL's network and had a long term PPA with UPCL. Further, as per clause 8.2 of PPA dated 03.07.2009, the Petitioner had agreed to transmit the power from the generating station on 33 kV Voltage to the interconnection point at 33 kV bus bar of the 33/11 kV Sub-station of UPCL at Ghansali.
- (8) PTCUL submitted that the Petitioner was not sure regarding the party against whom the it wanted to claim relief. The Petitioner was claiming certain amount which was derived by the Petitioner on some hypothetical calculation

and the Petitioner neither had the right to claim a self adjudged amount or any basis for arriving at the said figure.

- (9) PTCUL further submitted that even the MoU signed between PTCUL and the Petitioner clearly stated that the detailed planning, monitoring, construction and implementation would be as per the terms of PWTA to be entered into later stage, however, no PWTA/TSA was signed between PTCUL and the Petitioner as was required by UERC (Intra-State Open Access) Regulation, 2010.
- (10) Further, in compliance to the direction dated 25.02.2015, the Respondent No. 1 namely UPCL vide its letter No. 1347 dated 24.03.2015 submitted that there was no dispute, which required adjudication. The dispute would only arise if the Petitioner had any right under the Electricity Act or the rules and regulation made thereunder to claim for evacuation loss/generation/financial loss suffered by it as has been claimed by the Petitioner and the same have been denied by UPCL.
- (11) UPCL submitted that it was only after order dated 11.01.20011 passed by the Hon'ble APTEL in Appeal No. 88 of 2010 and Appeal No. 93 of 2010 and repeated request thereafter made by UPCL to the Petitioner that the Petitioner expressed its consent to enter into long term PPA with UPCL and consequently a supplementary PPA dated 10.01.2013 was executed between the parties.
- (12) UPCL submitted that the Petitioner was well aware of the limitation of available evacuation system of UPCL requested for its own benefits to enter into the PPA with UPCL and UPCL agreed to evacuate the power generated by the generating station of the Petitioner at the nearest available 33/11 kV Substation of UPCL at Ghansali to which the Petitioner agreed. As the Petitioner in its letter dated 02.04.2009 has accepted that there would be limitation on the power evacuation through the existing UPCL system, completion of the Ghansali-Chamba line, which clearly shows the knowledge of the Petitioner regarding the limitation of existing UPCL distribution system.

- (13) UPCL submitted that the present petition is an outcome of afterthought as the Petitioner had never demanded any amount from the UPCL before and has only for the purpose of creating a frivolous dispute, for the first time vide letter dated 21.08.2014 demanded a hypothetical sum of Rs. 1,776.58 lacs from UPCL. UPCL also submitted that at the time when PPA with the UPCL was entered into by the Petitioner, the Petitioner did not have any Open Access permission either on the transmission network of PTCUL nor on the distribution network of UPCL, further the Petitioner did not have any agreement for supply of power with any consumer within the state, the UPCL had no legal compulsion to enter into PPA with the Petitioner, by entering into the said PPA, UPCL only assisted the Petitioner in minimizing its losses and the same cannot be considered as contributing evacuation loss, if any sustained by the Petitioner.
- (14) UPCL further submitted that the Petitioner has not disclosed the provision of law or any contract under which the Petitioner is entitled to claim for evacuation losses etc. as has been claimed by the Petitioner.

4. Counter submissions of the Petitioner

- (1) On the comments of the Respondent No. 2, the Petitioner vide its submission dated 04.04.2015 placed its rejoinder before the Commission. The Petitioner submitted that:
- (a) Respondent No. 2 failed in discharging its contractual and legal obligations under the Power Wheeling Agreement, the MOU dated 12.06.2007 by wrongful and unilateral disconnection of the Petitioner's Project from the agreed arrangement for power evacuation and failure to build (even after a lapse of eight years) the promised 33/220 kV Ghansali substation as also to comply with its statutory obligations under the Electricity Act, 2003.
- (b) The Respondent No. 2 could not take benefit of its own fault for not discharging its contractual obligations and converting the act of execution by the Petitioner of the PPA/Supplementary PPA with UPCL as a reason for non-performance of PTCUL in discharging its obligations

under the Agreements or MoU / Act. The Petitioner further pointed out that an Open Access application dated 25.07.2007 was filed by the Petitioner with the Respondent No.2 in the year 2007 and a fee of Rs.1,00,000/- was paid by the Petitioner to the Respondent No. 2. The said Application was accepted by the Respondent No.2 but no connectivity was granted to the Project as agreed in the Power Wheeling Agreement and MOU. Just because a PPA had been executed by the Petitioner with UPCL, under the circumstances the said act of execution of the PPA would condone the lapses of PTCUL for breach of its obligations.

- (c) The evacuation system from UPCL was a de-facto necessity so that the energy generated from the Project could have been evacuated. The right of the Petitioner against the Respondent No.2 have been enshrined in the Power Wheeling Agreement, MoU and the Electricity Act, 2003 and which had been acknowledged by MD, PTCUL in the MoM dated 23.06.2010 that the 220 kV Ghansali sub-station would be constructed by June, 2012 which would be a permanent solution for evacuation requirement of the Petitioner's Project.
- (d) Due to failure of Respondent No. 2 in discharging its duties, the Petitioner suffered serious financial losses. Further, the Power Wheeling Agreement under Article 9.3 provided that *"In the event the PTCUL committed any breach of any terms of this Agreement, the Company shall be entitled to specific performance of this Agreement or claim such damages as would be available under the law, at its option, by giving thirty (30) days notice to the PTCUL"*.
- (e) As per Section 73 of the Indian Contract Act, 1872 the Petitioner was entitled to claim damages from the Respondent No. 2 for breach of terms and conditions of the Power Wheeling Agreement and MOU entered into between the Petitioner and the Respondent No. 2. Section 73 of the Indian Contract Act, 1872 reads as under:-

"73. Compensation for loss or damage caused by breach of contract- When a contract has been broken, the party who suffers by such breach is entitled to

receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of such breach."

- (f) As per prevailing laws including the Electricity Act, 2003 and the Indian Contract Act, 1872, any breach of contractual obligations by the licensee, in a contract existing between the licensee and the generating company would entitle the generating company to invoke the provision of the Electricity Act, 2003 for redressal of the disputes which had arisen because of such breach by the licensee.
- (g) The evacuation system under the PPA was till the Respondent No. 2 comes up with its own substation at Ghansali, whereafter the power generated from the Petitioner's generating station would be evacuated through 33/220 kV sub- station at Ghansali. With the signing of MOU which was as per the directions and decisions at the meeting on 26.06.2006, the Power Wheeling Agreement stood modified to the extent of Interconnection Point and did not absolve them of the responsibilities of the Respondent under the PWA.
- (h) Through various letters during the period from 2006-2013, it was brought out that the need for immediate compliance of their obligations under the Power Wheeling Agreement and the MOU. However, the Respondent No. 2 failed to respond to the same, thus, necessitating the filing of the aforementioned Petition under the provisions of the Electricity Act, 2003.
- (i) It had applied for Open Access in the year 2007 and the interconnection to the UPCL was an interim agreed arrangement with the two Respondents.
- (j) The Respondent No. 2 did not propose a Transmission Service Agreement and Power Wheeling Transmission Agreement as per the UERC (Inter-state Open Access) Regulations, 2010.

- (2) The Petitioner vide its submission dated 04.04.2015 submitted a rejoinder to the comments filed by Respondent No. 1 in the matter. In the said rejoinder, following has been submitted:
- (a) With regard to arising of the dispute, the Petitioner had a cause of action for filing of the instant Petition before the Commission. As per the PPA/contract between the parties, it was the responsibility of UPCL to ensure safe and efficient evacuation of energy generated from the Project at the Inter-connection point. However, UPCL had woefully failed to perform and thus had committed breach of the PPA/Contract/Agreements reached and deliberately ignored and failed to remedy and respond to the entreaties of the Petitioner. These actions/inactions of UPCL caused serious financial losses to the Petitioner, resulted in loss /reduced availability of renewable energy to Uttarakhand and thus dispute has arisen between the parties arising out of PPA/contract and the Commission has the jurisdiction under section 86(1)(f) of the Electricity Act, to adjudicate upon the dispute as detailed in the petition.
 - (b) The provisions of the Electricity Act, 2003, the rules framed there under and the Regulations as notified by the Commission entitles the Petitioner to raise claims against the distribution licensee for losses suffered by the Petitioner on account of the breach of the contractual and statutory obligations by the Respondent No. 1 to provide a safe and reliable transmissions network for transmission of electricity generated from the Project. Hence, the claims raised by the Petitioner in the aforementioned Petition are enforceable in the eyes of law.
 - (c) As stated to the extent of the execution of the Power Purchase Agreement by the Petitioner and PTC India Ltd. for sale of power generated from the Project and execution of the Power Purchase Agreement (PPA) dated 03.07.2009 executed between the Petitioner and the Respondent No. 2 are a matter of record. However, it was denied that the Power Purchase Agreement dated 03.07.2009 was not a valid long term Power Purchase Agreement as alleged and moreover the UPCL had been continuing to

breach its obligations under the PPA even after execution of Supplementary PPA.

- (d) The PPA dated 03.07.2009 was never a short term PPA, rather, the same was a long term PPA wherein the Petitioner had agreed to sell the energy generated from the Project for a period of 35 years. Merely incorporation of the termination clause in the PPA could not make the long term PPA to a Short term PPA, in the eyes of law, that too, when the parties had been specifically complying with the provisions of the said PPA dated 03.07.2009 and the relationship between the parties was still subsisting. The PPA dated 03.07.2009 was completely legal and valid in the eyes of law and the breach of obligations by UPCL would lead to creation of right in the Petitioner to demand compensation in Law from UPCL. The argument, that UPCL was not at fault for not providing full evacuation facilities as M/s Swasti had intention to supply power outside Uttarakhand, was against the responsibilities cast upon the transmission and distribution entities under Electricity Act, 2003 to provide non discriminatory access and also the fact that the evacuation limitations are perhaps seen as a weapon to bring the Generator to a no other go situation.
- (e) The Petitioner had written to UPCL vide letter dated 23.03.2011 expressing his willingness to enter into long term PPA with UPCL. The Commission vide its order dated 17.12.2012 and 08.01.2013 had castigated the conduct of UPCL in delaying the execution of the Supplementary PPA with the Petitioner. The PPA dated 03.07.2009 was legal and valid long term PPA executed between the Petitioner and the Respondent No. 1 for sale of power generated from the Project.
- (f) The statement of UPCL recounted above also brought out the fact and circumstances of the situation into which the Petitioner was put to and continues to suffer due to the restrictions/inadequacy of the evacuation system. However, the Respondent could not under the law be allowed to shy away from its statutory, legal and contractual obligations by relying

upon the facts which lead to the execution of the Power Purchase Agreement dated 03.07.2009 and Supplementary PPA dated 10.01.2013.

- (g) The Respondents No. 1 & 2 were obligated to provide a suitable and reliable transmission network for evacuation of the energy generated from the Project, however, the Respondents No. 1 & 2 completely failed to properly discharge its contractual and statutory obligations, that too, without any default on the part of the Petitioner.
- (h) After the execution of the PPA dated 03.07.2009, it was the Respondent No.1 who was obligated to evacuate the power generated from the Project beyond Inter-connection Point through a reliable transmission network as decided by GoU in the meeting held on 26.12.2006 and as per subsequent MoU and Agreement with the Respondents, however, the Respondents No. 1 & 2 had completely failed to provide a reliable transmission network leading to huge losses to the Petitioner.
- (i) Moreover, the Commission could not countenance a situation in the State, where PTCUL breached its obligation to come up with the evacuation system, as per the contract executed with it, and thereafter UPCL stated they would evacuate the energy from the Project, only if PPA executed with UPCL, and on execution of PPA with UPCL, wherein UPCL was undertaken to provide safe, reliable and efficient evacuation system, however, further now, UPCL turned around and stated though it had failed to provide safe, reliable and efficient evacuation system, however, it would not liable for payment of compensation to Petitioner in Law.
- (j) The statement of Respondent No. 1 that while entering into the PPA dated 03.07.2009 it had only assisted the Petitioner in minimizing his losses was not valid as on perusal of the various letters, correspondence and minutes of meetings would make it evident that the Petitioner had suffered huge financial losses on account of inactions on the part of the Respondents in providing a suitable evacuation system for transmission of electricity from the Project. The Respondent therefore was legally

bound and liable to make good, the losses suffered by the Petitioner. The illegal act of the Respondents for not providing open access to the Petitioner could not be converted as a defense.

- (3) Further, the Commission heard the matter on 18.08.2015 and issued an Order dated 18.08.2015. The direction issued in the Order is reproduced as under:

“Respondent No. 2 namely PTCUL is required to submit the present status of the 220 kV GIS Substation, Ghansali alongwith the detailed construction schedule and target date of energisation of the aforesaid Substation, latest by 28.08.2015.

... ”

- (4) In compliance to the Commission’s directions issued vide Order dated 18.08.2015 Respondent No. 2 vide its letter dated 27.08.2015 submitted that the target date of completion of 220 kV Ghansali S/s would be December 2016.

5. Commission’s views and decision

- (1) On examination of the submissions made by the Petitioner & Respondents in the matter of Petition filed under Section 86(1)(f) of the Electricity Act, 2003 for adjudication of dispute between the Petitioner and the Respondents namely PTCUL & UPCL, it has been observed that the dispute pertains to the compensation sought by the Petitioner from both the Respondents in lieu of loss of generation due to evacuation arrangements provided by the Respondents. Even during this proceeding both of the Respondents have rejected these claims vide their written submissions filed before the Commission. Delving into the matter, it has been found that the Agreements namely Power Wheeling Agreement dated 30.09.2005 and Power Purchase Agreements dated 03.07.2009 between the Petitioner and the Respondents do not have specific conditions under which the Petitioner could be compensated for the loss of generation due to interim evacuation arrangement as was agreed during aforesaid meetings/agreements where the Petitioner has always been a party alongwith the Respondents.
- (2) Further, on examination of the Agreements, it is found that there are no conditions on compensation as claimed by the Petitioner in either Power Wheeling Agreement or in the PPA entered into by the Generator with PTCUL or UPCL for delay in commissioning of the evacuation system. However, it

cannot be denied that it is the prime responsibility of the STU i.e. PTCUL to ensure smooth flow of electricity from a generating station to the load centre alongwith development of an efficient, co-ordinated and economical system of intra-State Transmission lines in a non-discriminatory manner as provided in Section 39 of the Electricity Act, 2003. The same is reproduced as under:

“39. State Transmission Utility and functions:

...

- (2) *The functions of the State Transmission Utility shall be-*
- (a) *to undertake transmission of electricity through intra-State transmission system;*
 - (b) *to discharge all functions of planning and co-ordination relating to intra-state transmission system with-*
 - (i) *Central Transmission Utility;*
 - (ii) *State Governments;*
 - (iii) *generating companies;*
 - (iv) *Regional Power Committees;*
 - (v) *Authority;*
 - (vi) *licensees;*
 - (vii) *any other person notified by the State Government in this behalf;*
 - (c) *to ensure development of an efficient, co-ordinated and economical system of intra-State transmission lines for smooth flow of electricity from a generating station to the load centres;*
 - (d) *to provide non-discriminatory open access to its transmission system for use by-*
 - (i) *any licensee or generating company on payment of the transmission charges ;*
- or*

... ”

- (3) Notwithstanding the interim evacuation arrangements agreed by the Petitioner in Agreements and the Petitioner being fully aware of reliability of such arrangements, the Commission is of the view that both the Respondent No.1 and Respondent No.2 have been showing lackadaisical approach towards construction of the 220/33 kV S/s at Ghansali or strengthening/augmentation of the existing 33 kV evacuation system respectively, which is highly reprehensible. Further, with regard to construction of 220 kV S/s Ghansali, the delay is solely attributable to Respondent No.2, the Commission during these proceedings had directed PTCUL to submit the current status of 220 kV S/s Ghansali alongwith the detailed construction schedule and target date of the energisation of the aforesaid substation. In this regard, PTCUL submitted that the target date of completion of 220 kV Ghansali S/s would be December 2016. The Commission expresses its displeasure on the delay in commissioning of the

transmission S/s and **directs PTCUL to submit quarterly status of the same within 15 days of the end of each quarter.**

- (4) With regard to the contention of the Petitioner that the PPA dated 03.07.2009 was a long term PPA is not tenable, it would be relevant to refer to the Commission's Order dated 17.12.2012, which was issued for adjudicating the dispute between M/s Swasti Power Engineering Limited and UPCL arising out of the Power Purchase Agreement dated 03.07.2009. The Commission in the said Order had held as under:

"15. With regard to the submission of the Petitioner at para 11 above the Commission is of the view that on 03.07.2009 when the conditional PPA was signed by the Petitioner, the UERC RE regulations, 2008 were effective. The Petitioner as well as the Respondent were required to abide by the relevant provisions of that regulation and must have framed the PPA consistent with the said Regulations. The parties should have come up before the Commission for obtaining approval of the agreement executed.

16. Taking cognizance of the terms and conditions of the PPA dated 03.07.2009 entered between the Petitioner and the Respondent, the Commission is of the view that the said PPA cannot be construed as a valid long term agreement particularly on account of the conditions provided in the agreement. Some of the conditions are reproduced below...

...It is noted that both recital and duration of PPA are not only conditional but also bestow unilateral power of termination to the Petitioner. In view of this, the Commission holds that the power purchase agreement, as it exists today, is not a valid long term agreement."

Thus, the Commission had already decided in its earlier Order dated 17.12.2012 that the existing PPA was not a valid long term agreement and this view has also attained finality as the Petitioner has not challenged the same.

- (5) The Commission in the UERC (Tariff and Other Terms for Supply of Electricity from Renewable Energy Sources and non-fossil fuel based Co-generating Stations) (First Amendment) Regulations, 2012 had allowed the provisions of deemed generation for Small Hydro Plants (SHPs) selling power to UPCL (Respondent No.1) in the State. The said Regulations provides the mechanism for calculation of deemed generation and also lays down the circumstances under which deemed generation can be claimed by SHPs in the State. With regard to the Petitioner's claim seeking compensation on account of trippings/breakdowns of existing evacuation lines/system provided by UPCL,

the Generator is at liberty to apply to UPCL for claiming deemed generation charges in accordance with the aforesaid provisions of Regulations and only if such claim is disputed by UPCL, the Petitioner may approach the Commission for adjudication under the Act.

- (6) As far as the entitlement of claims against damages under Section 73 of the Indian Contract Act, 1872 from the Respondent No. 2 for breach of terms and conditions of the Power Wheeling Agreement and MoU entered into between the Petitioner and the Respondent No.2, the Commission is of the view that any claims made by the parties under the Agreement should flow from that Agreement and cannot be independent of it. Hence, the contention of the Petitioner making claim on the basis of referred documents under Section 73 of the Indian Contract Act, 1872 are not maintainable.
- (7) With regard to the contention of the Petitioner to direct the Respondent to pay interest @18% per annum, since the claims of the Petitioner are adjudged as not maintainable, hence, claim of interest does not survive.

Accordingly, the Petition is disposed off.

(K.P. Singh)
Member

(C.S. Sharma)
Member

(Subhash Kumar)
Chairman